

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Oct 28, 2021**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOSHUA C.,

Plaintiff,

v.

KILOLO KIJAKAZI,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

NO: 2:20-CV-03135-LRS

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 14 and 16. This matter was submitted for consideration without oral argument. The Plaintiff is represented by Attorney D. James Tree. The Defendant is represented by Special Assistant United States Attorney Sarah

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<sup>1</sup> Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 Moum. The Court has reviewed the administrative record, the parties' completed  
2 briefing, and is fully informed. For the reasons discussed below, the Court  
3 **GRANTS** Plaintiff's Motion for Summary Judgment, ECF No. 14, and **DENIES**  
4 Defendant's Motion for Summary Judgment, ECF No. 16.

### 5 **JURISDICTION**

6 Plaintiff Joshua C.<sup>2</sup> filed for supplemental security income and disability  
7 insurance benefits on April 14, 2017, alleging an onset date of June 1, 2016. Tr.  
8 242-60. Benefits were denied initially, Tr. 119-22, and upon reconsideration, Tr.  
9 130-36. A hearing before an administrative law judge ("ALJ") was conducted on  
10 October 29, 2019. Tr. 14-45. Plaintiff was represented by counsel and testified at  
11 the hearing. *Id.* The ALJ denied benefits, Tr. 106-18, and the Appeals Council  
12 denied review. Tr. 1. The matter is now before this court pursuant to 42 U.S.C. §§  
13 405(g); 1383(c)(3).

### 14 **BACKGROUND**

15 The facts of the case are set forth in the administrative hearing and  
16 transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner.  
17 Only the most pertinent facts are summarized here.

18 Plaintiff was 36 years old at the time of the hearing. *See* Tr. 288. He  
19 stopped going to school in the eighth grade. Tr. 25. Plaintiff testified that he lives

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20  
21 <sup>2</sup> In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's first  
name and last initial.

1 with a friend. Tr. 35. Plaintiff has work history as a fast-food worker, delivery  
2 driver, waiter, dishwasher, warehouse worker, and kitchen helper. Tr. 38-39.  
3 Plaintiff testified that his job ended because he would lose his temper and end up  
4 “throwing whatever is around”; and while at the job he was frequently transferred  
5 because he was late, he would call in sick, and he did not understand “what they  
6 wanted done.” Tr. 20-22. He also testified that he cannot have a job because of  
7 his education level, his anxiety, and his anger issues. Tr. 29-30.

8 Plaintiff reported that he has had angry interactions with supervisors, and at  
9 one point threw a chair across the room. Tr. 23-24. He testified that he has trouble  
10 with reading, writing, and math. Tr. 25. Plaintiff reported that he does not like  
11 being around large groups of people, he keeps to himself, and he leaves his home  
12 once or twice a week. Tr. 26.

### 13 STANDARD OF REVIEW

14 A district court’s review of a final decision of the Commissioner of Social  
15 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
16 limited; the Commissioner’s decision will be disturbed “only if it is not supported  
17 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,  
18 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a  
19 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159  
20 (quotation and citation omitted). Stated differently, substantial evidence equates to  
21 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and  
citation omitted). In determining whether the standard has been satisfied, a

1 reviewing court must consider the entire record as a whole rather than searching  
2 for supporting evidence in isolation. *Id.*

3 In reviewing a denial of benefits, a district court may not substitute its  
4 judgment for that of the Commissioner. “The court will uphold the ALJ's  
5 conclusion when the evidence is susceptible to more than one rational  
6 interpretation.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.  
7 2008). Further, a district court will not reverse an ALJ’s decision on account of an  
8 error that is harmless. *Id.* An error is harmless where it is “inconsequential to the  
9 [ALJ’s] ultimate nondisability determination.” *Id.* (quotation and citation omitted).  
10 The party appealing the ALJ’s decision generally bears the burden of establishing  
11 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

### 12 **FIVE-STEP EVALUATION PROCESS**

13 A claimant must satisfy two conditions to be considered “disabled” within  
14 the meaning of the Social Security Act. First, the claimant must be “unable to  
15 engage in any substantial gainful activity by reason of any medically determinable  
16 physical or mental impairment which can be expected to result in death or which  
17 has lasted or can be expected to last for a continuous period of not less than twelve  
18 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s  
19 impairment must be “of such severity that he is not only unable to do his previous  
20 work[,] but cannot, considering his age, education, and work experience, engage in  
21 any other kind of substantial gainful work which exists in the national economy.”  
42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential analysis to  
2 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
3 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner  
4 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),  
5 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the  
6 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
7 404.1520(b), 416.920(b).

8 If the claimant is not engaged in substantial gainful activity, the analysis  
9 proceeds to step two. At this step, the Commissioner considers the severity of the  
10 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the  
11 claimant suffers from "any impairment or combination of impairments which  
12 significantly limits [his or her] physical or mental ability to do basic work  
13 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),  
14 416.920(c). If the claimant's impairment does not satisfy this severity threshold,  
15 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.  
16 §§ 404.1520(c), 416.920(c).

17 At step three, the Commissioner compares the claimant's impairment to  
18 severe impairments recognized by the Commissioner to be so severe as to preclude  
19 a person from engaging in substantial gainful activity. 20 C.F.R. §§  
20 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more  
21 severe than one of the enumerated impairments, the Commissioner must find the  
claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the  
2 severity of the enumerated impairments, the Commissioner must pause to assess  
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
4 defined generally as the claimant's ability to perform physical and mental work  
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§  
6 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's  
9 RFC, the claimant is capable of performing work that he or she has performed in  
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

11 If the claimant is capable of performing past relevant work, the Commissioner  
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).

13 If the claimant is incapable of performing such work, the analysis proceeds to step  
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant's  
16 RFC, the claimant is capable of performing other work in the national economy.  
17 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,  
18 the Commissioner must also consider vocational factors such as the claimant's age,  
19 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the  
21 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other

1 work, analysis concludes with a finding that the claimant is disabled and is  
2 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

3 The claimant bears the burden of proof at steps one through four. *Tackett v.*  
4 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,  
5 the burden shifts to the Commissioner to establish that (1) the claimant is capable  
6 of performing other work; and (2) such work “exists in significant numbers in the  
7 national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*,  
8 700 F.3d 386, 389 (9th Cir. 2012).

### 9 **ALJ’S FINDINGS**

10 At step one, the ALJ found that Plaintiff has not engaged in substantial  
11 gainful activity since June 1, 2016, the alleged onset date. Tr. 111. At step two,  
12 the ALJ found that Plaintiff has the following severe impairments: degenerative  
13 disc disease; personality disorder; bipolar disorder; depressive disorder; anxiety  
14 disorder; and post-traumatic stress disorder. Tr. 111. At step three, the ALJ found  
15 that Plaintiff does not have an impairment or combination of impairments that  
16 meets or medically equals the severity of a listed impairment. Tr. 112. The ALJ  
17 then found that Plaintiff has the RFC

18 to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b)  
19 except that he can occasionally stoop, kneel, crouch, crawl, and climb  
20 ladders, ropes, or scaffolds; frequently climb ramps or stairs; and must avoid  
21 concentrated exposure to excessive vibration. He can perform simple  
routine tasks, in a routine work environment with simple work related  
decisions, and can have occasional superficial interaction with coworkers,  
supervisors, and the public.

Tr. 113. At step four, the ALJ found that Plaintiff is unable to perform any past relevant work. Tr. 116. At step five, the ALJ found that considering Plaintiff's age, education, work experience, and RFC, there are jobs that exist in significant numbers in the national economy that Plaintiff can perform, including: grain picker, merchandise marker, and maid. Tr. 117-18. On that basis, the ALJ concluded that Plaintiff has not been under a disability, as defined in the Social Security Act, from June 1, 2016, through the date of the decision. Tr. 118.

## ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying him disability insurance benefits under Title II of the Social Security Act and supplemental security income benefits under Title XVI of the Social Security Act. ECF No. 14. Plaintiff raises the following issues for this Court's review:

1. Whether the ALJ properly considered Plaintiff's symptom claims;
2. Whether the ALJ properly considered the medical opinion evidence; and
3. Whether the ALJ properly considered the lay witness testimony.

## DISCUSSION

### **A. Plaintiff's Symptom Claims**

An ALJ engages in a two-step analysis when evaluating a claimant's testimony regarding subjective pain or symptoms. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged."

*Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not



1 required to show that her impairment could reasonably be expected to cause the  
2 severity of the symptom he has alleged; he need only show that it could reasonably  
3 have caused some degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591  
4 (9th Cir. 2009) (internal quotation marks omitted).

5 Second, “[i]f the claimant meets the first test and there is no evidence of  
6 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
7 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
8 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal  
9 citations and quotations omitted). “General findings are insufficient; rather, the  
10 ALJ must identify what testimony is not credible and what evidence undermines  
11 the claimant’s complaints.” *Id.* (quoting *Lester*, 81 F.3d at 834); *Thomas v.*  
12 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (“[T]he ALJ must make a credibility  
13 determination with findings sufficiently specific to permit the court to conclude  
14 that the ALJ did not arbitrarily discredit claimant’s testimony.”). “The clear and  
15 convincing [evidence] standard is the most demanding required in Social Security  
16 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*  
17 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

18 Here, the ALJ found Plaintiff’s medically determinable impairments could  
19 reasonably be expected to cause some of the alleged symptoms; however,  
20 Plaintiff’s “statements concerning the intensity, persistence and limiting effects of  
21 these symptoms are not entirely consistent with the medical evidence and other  
evidence in the record” for several reasons. Tr. 114.

1 First, the ALJ noted that Plaintiff reported improvement in symptoms with  
2 medication adjustment. Tr. 114 (citing Tr. 428, 538). A favorable response to  
3 treatment can undermine a claimant's complaints of debilitating pain or other  
4 severe limitations. *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008). In  
5 support of this finding, the ALJ cited two treatment records: (1) in September 2017  
6 Plaintiff reported improvement after his medication was adjusted, and (2) in  
7 January 2018 Plaintiff reported "his mood had improved" and he was using  
8 medication for anxiety "with benefit." Tr. 114, 538. However, as noted by  
9 Plaintiff, at the September 2017 visit Plaintiff also reported that he was having  
10 "intrusive, auditory hallucinations that can be command in nature to harm  
11 himself," and the January 2018 treatment note recounted a recent visit during  
12 which Plaintiff made verbal threats toward his therapist. Tr. 428, 538. Moreover,  
13 the ALJ cited Plaintiff's report that he had not used Valium or Xanax recently;  
14 however, "this was not for lack of symptoms, but rather because his provider told  
15 him not to use these medications." ECF No. 14 at 6 (citing Tr. 549 (also noting he  
16 was purchasing these medications "on the streets")). Thus, based solely on these  
17 two treatment notes, alleged improvement in Plaintiff's symptoms with the use of  
18 medication was not a clear and convincing reason, supported by substantial  
19 evidence, to discount her symptom claims.

20 Second, the ALJ cited one December 2017 treatment record indicating that  
21 Plaintiff was "only modestly engaged in therapy and rarely uses skills outside of  
agency and that he was likely seeking secondary gains from his mental health care

1 providers in terms of approval for disability benefits.” Tr. 114 (citing Tr. 397  
2 (noting homework for therapy was not completed), 783). As an initial matter,  
3 while an ALJ may consider motivation and the issue of secondary gain in  
4 evaluating symptom claims; this single statement cited by the ALJ is not  
5 substantial evidence to support a conclusion that Plaintiff was motivated by  
6 secondary gain.<sup>3</sup> *See Matney on Behalf of Matney v. Sullivan*, 981 F.2d 1016,  
7 1020 (9th Cir. 1992). Moreover, unexplained, or inadequately explained, failure to  
8 follow a prescribed course of treatment may be the basis for discounting Plaintiff’s  
9 symptom claims unless there is a showing of a good reason for the failure. *Orn v.*

10 \_\_\_\_\_  
11 <sup>3</sup> Plaintiff argues at length that the evidence relied on by the ALJ in making this  
12 finding, which consisted of a single treatment note indicating that Plaintiff was  
13 “likely seeking secondary gains,” was “brought [] forward based on [the  
14 provider’s] misreading of a treatment note from August 2017.” ECF No. 14 at 8.  
15 However, as noted by Defendant, “there is nothing in the record to indicate [the  
16 provider’s] understanding of [Plaintiff’s] reports was based only on a reading of  
17 treatment notes.” ECF No. 16 at 5. Moreover, the Court is not permitted to  
18 consider this reasoning because it was not offered by the ALJ in the decision as a  
19 reason to discount Plaintiff’s symptom claims. *See Bray*, 554 F.3d at 1226 (the  
20 Court “review[s] the ALJ’s decision based on the reasoning and factual findings  
21 offered by the ALJ—not *post hoc* rationalizations that attempt to intuit what the  
adjudicator may have been thinking.”).

1 *Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). However, as noted by Plaintiff, the  
2 record indicates that he “persistently worked with Dr. Powers to find the right  
3 combination of medications,” and his therapists’ treatment notes consistently  
4 observe that Plaintiff was engaged in sessions and attempting to use skills to  
5 regulate his mood or improve functioning. See Tr. 538, 543, 552, 675, 682, 692,  
6 695, 706, 723, 733-34, 741, 747, 918. Finally, and perhaps most notably, this  
7 finding “is contrary to the ALJ’s own conclusion at the end of the [same]  
8 paragraph noting [Plaintiff] was actively working to try to moderate his moods and  
9 use his skills.” ECF No. 14 at 6-7 (citing Tr. 114-15). For all of these reasons, the  
10 ALJ’s brief reference to Plaintiff’s alleged poor compliance with treatment, and a  
11 single citation to “likely” secondary gain motivation, were not specific, clear, and  
12 convincing reasons to reject Plaintiff’s symptom claims.

13 Third, the ALJ generally noted, without citation to the record, that “although  
14 [Plaintiff] reports his mental health issues have been longstanding, he has been  
15 able to maintain jobs for more than 3.5 year periods, [and] he has not been  
16 incarcerated or arrested for any behavioral or anger related issues during the period  
17 at issue.” Tr. 115. As an initial matter, as indicated by Plaintiff, a mere lack of  
18 criminal history does not support an inference that aggressive or violent behavior  
19 did not occur. ECF No. 14 at 11. Moreover, in considering Plaintiff’s symptom  
20 claims, the ALJ “must specifically identify the testimony she or he finds not to be  
21 credible and must explain what evidence undermines the testimony.” *Holohan v.*  
*Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001). The relevance of Plaintiff’s

1 criminal history, or lack thereof, in this context is unclear to the Court, and  
2 therefore does not qualify as a specific, clear and convincing reason to discount  
3 Plaintiff's symptom claims.

4       Next, the ability to work can be considered in assessing Plaintiff's symptom  
5 claims. *Bray*, 554 F.3d at 1227; *see also* 20 C.F.R. § 404.1571 (employment  
6 "during any period" of claimed disability may be probative of a claimant's ability  
7 to work at the substantial gainful activity level). However, "occasional symptom-  
8 free periods – and even the sporadic ability to work – are not inconsistent with  
9 disability." *Lester*, 81 F.3d at 833); *see also Lingenfelter v. Astrue*, 504 F.3d 1028,  
10 1038 (9th Cir. 2007) ("It does not follow from the fact that a claimant tried to work  
11 for a short period of time and, because of his impairments, *failed*, that he did not  
12 then experience pain and limitations severe enough to preclude him from  
13 *maintaining* substantial gainful employment."). Moreover, Plaintiff's work history  
14 prior to his alleged onset date are generally of limited probative value. *See*  
15 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008).  
16 Here, the ALJ offered no evidence as to when the referenced "3.5 year periods" of  
17 work occurred, nor did she consider evidence in the record that Plaintiff was fired  
18 from his previous job "due to anger issues." *See* ECF No. 14 at 12 (citing Tr. 22-  
19 24). Thus, the ALJ's rejection of Plaintiff's claims based on his sporadic ability to  
20 work prior to the alleged onset date, is not a clear and convincing reason,  
21 supported by substantial evidence, to reject his symptom claims.

1 Fourth, the ALJ noted that Plaintiff has “successfully lived with another  
2 adult for a number of years”; and he “drives, goes shopping, gets along with family  
3 members and, . . . he has successfully used learned skills in dealing with his anger  
4 issues.” Tr. 115. Thus, the ALJ concluded that Plaintiff’s “behaviors and conduct  
5 demonstrate he is better able to control his anger and aggression than he suggests.”  
6 Tr. 115. A claimant need not be utterly incapacitated in order to be eligible for  
7 benefits. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *see also Orn*, 495 F.3d  
8 at 639 (“the mere fact that a plaintiff has carried on certain activities . . . does not  
9 in any way detract from her credibility as to her overall disability.”). Regardless,  
10 even where daily activities “suggest some difficulty functioning, they may be  
11 grounds for discrediting the [Plaintiff’s] testimony to the extent that they contradict  
12 claims of a totally debilitating impairment.” *Molina*, 674 F.3d at 1113. However,  
13 in considering Plaintiff’s symptom claims, the ALJ “must specifically identify the  
14 [symptom claims] she or he finds not to be credible and must explain what  
15 evidence undermines the testimony.” *Holohan v. Massanari*, 246 F.3d 1195, 1208  
16 (9th Cir. 2001). Here, as noted by Plaintiff, the ALJ failed to explain what  
17 Plaintiff’s ability to drive and go shopping “had to do with managing his anger”;  
18 nor did the ALJ consider Plaintiff’s reports that he only shops with someone else,  
19 “and even then, he abandons his cart about half the time.” *Id.* (citing Tr. 27, 659).  
20 Moreover, as to the ALJ’s finding that Plaintiff “successfully lived” with another  
21 adult, the record also contains evidence that Plaintiff avoids family and shows  
irritability, has been aggressive toward a roommate on at least one occasion, and

1 has made threats toward medical providers and roommates. ECF No. 14 at 11  
2 (citing Tr. 35, 344, 433, 546, 766, 819). Based on the foregoing, the ALJ's general  
3 reference to an inconsistency between Plaintiff's alleged inability to control his  
4 aggression, and his ability to live with others, shop, and drive, is not a clear and  
5 convincing reason, supported by substantial evidence, to discredit the entirety of  
6 Plaintiff's symptom claims.

7 Fifth, and finally, the ALJ briefly noted that Plaintiff "had unremarkable  
8 mental status exams throughout the period at issue." Tr. 114. The medical  
9 evidence is a relevant factor in determining the severity of a claimant's pain and its  
10 disabling effects. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); 20  
11 C.F.R. § 404.1529(c)(2). However, an ALJ may not discredit a claimant's pain  
12 testimony and deny benefits solely because the degree of pain alleged is not  
13 supported by objective medical evidence. *Rollins*, 261 F.3d at 857; *Bunnell v.*  
14 *Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601  
15 (9th Cir. 1989). In support of this finding, the ALJ cited mental status  
16 examinations that noted Plaintiff was alert, was oriented in all spheres, had normal  
17 speech, had congruent affect, had intact attention and concentration, and was at  
18 "baseline" memory. Tr. 114, 381, 392, 404, 415, 429, 456, 539. However, as  
19 noted by Plaintiff, mental status examinations throughout the relevant adjudicatory  
20 record also include observations that he was anxious, depressed, tearful or crying,  
21 had psychomotor agitation, had flat affect, was agitated or annoyed, had poor  
insight, reported auditory hallucinations, had impaired eye contact, and had racing

1 thoughts. ECF No. 14 at 4 (citing Tr. 314-15, 376, 381, 396-97, 399, 402, 426,  
2 433, 546, 549, 556, 658, 661-62, 678, 687, 701, 758, 764, 769, 860, 912, 931, 953).

3 Moreover, regardless of whether the ALJ erred in finding Plaintiff's  
4 symptom claims were not corroborated by objective testing and physical  
5 examinations, it is well-settled in the Ninth Circuit that an ALJ may not discredit a  
6 claimant's pain testimony and deny benefits solely because the degree of pain  
7 alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261  
8 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir.  
9 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). As discussed in detail  
10 above, the additional reasons given by the ALJ for discounting Plaintiff's symptom  
11 claims were legally insufficient. Thus, because lack of corroboration by objective  
12 evidence cannot stand alone as a basis for rejecting Plaintiff's symptom claims,  
13 the ALJ's finding is inadequate.

14 The Court concludes that the ALJ did not provide clear and convincing  
15 reasons, supported by substantial evidence, for rejecting Plaintiff's symptom  
16 claims. On remand, the ALJ must reconsider Plaintiff's symptom claims.

### 17 **B. Medical Opinions**

18 For claims filed on or after March 27, 2017, new regulations apply that  
19 change the framework for how an ALJ must evaluate medical opinion evidence.  
20 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL  
21 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20 C.F.R. §§ 404.1520c, 416.920c.

The new regulations provide that the ALJ will no longer "give any specific



1 evidentiary weight...to any medical opinion(s)..." *Revisions to Rules*, 2017 WL  
2 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R. §§ 404.1520c(a),  
3 416.920c(a). Instead, an ALJ must consider and evaluate the persuasiveness of all  
4 medical opinions or prior administrative medical findings from medical sources.  
5 20 C.F.R. §§ 404.1520c(a) and (b), 416.920c(a) and (b). The factors for evaluating  
6 the persuasiveness of medical opinions and prior administrative medical findings  
7 include supportability, consistency, relationship with the claimant (including  
8 length of the treatment, frequency of examinations, purpose of the treatment,  
9 extent of the treatment, and the existence of an examination), specialization, and  
10 "other factors that tend to support or contradict a medical opinion or prior  
11 administrative medical finding" (including, but not limited to, "evidence showing a  
12 medical source has familiarity with the other evidence in the claim or an  
13 understanding of our disability program's policies and evidentiary requirements").  
14 20 C.F.R. §§ 404.1520c(c)(1)-(5), 416.920c(c)(1)-(5).

15 Supportability and consistency are the most important factors, and therefore  
16 the ALJ is required to explain how both factors were considered. 20 C.F.R. §§  
17 404.1520c(b)(2), 416.920c(b)(2). Supportability and consistency are explained in  
18 the regulations:

19 (1) *Supportability*. The more relevant the objective medical evidence  
20 and supporting explanations presented by a medical source are to  
21 support his or her medical opinion(s) or prior administrative medical  
finding(s), the more persuasive the medical opinions or prior  
administrative medical finding(s) will be.

1 (2) *Consistency*. The more consistent a medical opinion(s) or prior  
2 administrative medical finding(s) is with the evidence from other  
3 medical sources and nonmedical sources in the claim, the more  
persuasive the medical opinion(s) or prior administrative medical  
finding(s) will be.

4 20 C.F.R. §§ 404.1520c(c)(1)-(2), 416.920c(c)(1)-(2). The ALJ may, but is not  
5 required to, explain how the other factors were considered. 20 C.F.R. §§  
6 404.1520c(b)(2), 416.920c(b)(2).<sup>4</sup> However, when two or more medical opinions  
7 or prior administrative findings “about the same issue are both equally well-  
8 supported ... and consistent with the record ... but are not exactly the same,” the

9 \_\_\_\_\_  
10 <sup>4</sup> Defendant argues that the standards articulated by Plaintiff for considering  
11 medical opinion in cases filed on or after March 27, 2017 do not apply because  
12 they are inconsistent with the new regulatory scheme. ECF No. 16 at 12-14.  
13 However, the Court finds that resolution of whether an ALJ is still required to  
14 provide specific and legitimate reasons for discounting a contradicted opinion from  
15 a treating or examining physician is unnecessary to the disposition of this case. “It  
16 remains to be seen whether the new regulations will meaningfully change how the  
17 Ninth Circuit determines the adequacy of [an] ALJ’s reasoning and whether the  
18 Ninth Circuit will continue to require that an ALJ provide ‘clear and convincing’  
19 or ‘specific and legitimate reasons’ in the analysis of medical opinions, or some  
20 variation of those standards.” *Gary T. v. Saul*, No. EDCV 19-1066-KS, 2020 WL  
21 3510871, at \*3 (C.D. Cal. June 29, 2020) (citing *Patricia F. v. Saul*, No. C19-  
5590-MAT, 2020 WL 1812233, at \*3 (W.D. Wash. Apr. 9, 2020)).

1 ALJ is required to explain how “the other most persuasive factors in paragraphs  
2 (c)(3) through (c)(5)” were considered. 20 C.F.R. §§ 404.1520c(b)(3),  
3 416.920c(b)(3).

4 Here, Plaintiff was examined by psychologists in March 2017 and January  
5 2019. In March 2017, R.A. Cline, Psy.D. examined Plaintiff and assessed marked  
6 limitations in his ability to communicate and perform effectively in a work setting,  
7 and maintain appropriate behavior in a work setting. Tr. 374. In January 2019, T.  
8 Bowes, Psy.D. examined Plaintiff and opined that he had marked limitations in his  
9 ability to understand, remember, and persist in tasks by following detailed  
10 instructions; perform activities within a schedule, maintain regular attendance, and  
11 be punctual within customary tolerances without special supervision; communicate  
12 and perform effectively in a work setting, complete a normal work day and work  
13 week without interruptions from psychologically based symptoms; and set realistic  
14 goals and plan independently. Tr. 902.

15 As an initial matter, the Court notes that the ALJ did not make any explicit  
16 findings as to whether she found these opinions “persuasive,” as per the  
17 regulations. *See* Tr. 115-16. Instead, the ALJ noted that both Dr. Bowes and Dr.  
18 Cline did not review any additional records prior to making their respective  
19 assessments, and further noted that Dr. Cline “documented a generally  
20 unremarkable mental status exam.” Tr. 115. The extent of medical records  
21 reviewed by the examining providers arguably goes to the supportability factor  
under the new regulations; however, the regulations specifically direct that the

1 more relevant the objective medical evidence and supporting explanations  
2 presented by a medical source are to support his or her medical opinion, the more  
3 persuasive the medical opinion will be. 20 C.F.R. §§ 404.1520c(c)(1),  
4 416.920c(c)(1). The only finding by the ALJ as to the amount of supporting  
5 explanation provided by Dr. Cline and Dr. Bowes is a passing reference to  
6 “generally unremarkable mental status exam[s].” Tr. 115-16. However, as noted  
7 by Plaintiff, the ALJ failed to consider the results of these providers’ clinical  
8 interviews and mental status examinations, which included findings of fair to  
9 marginal eye contact, “somewhat passive aggressive,” slightly flattened affect,  
10 dysphoric mood, thought content not within normal limits, endorsed suicidal  
11 ideation and auditory hallucinations, did not know the date, limited fund of  
12 knowledge, abstract thought not within normal limits, concentration not within  
13 normal limits, insight poor or marginally intact, and judgment intact “at a basic  
14 level.” Tr. 375-76, 903-04. Dr. Cline and Dr. Bowes also performed a Rey test  
15 that found Plaintiff gave an excellent level of effort with no evidence of  
16 malingering, and a Beck Depression Inventory test that indicated severe depressive  
17 symptoms. Tr. 372, 901. Based on the foregoing, the Court finds any finding by  
18 the ALJ as to supportability was not supported by substantial evidence.

19 Second, as to consistency, the ALJ generally found that both opinions,  
20 respectively, were inconsistent with Plaintiff’s treatment records, and Dr. Bowes’  
21 opinion was also “inconsistent with documented mental status exams.” Tr. 116. In  
support of this finding, the ALJ relied entirely upon Dr. Cline and Dr. Bowes’ own

1 mental status examination results, performed as part of their examinations, and a  
2 general reference to Plaintiff's treatment record "as discussed [in the section of the  
3 decision addressing Plaintiff's symptom claims]." Tr. 116, 371-76, 903. However,  
4 as discussed above, (1) the ALJ failed to consider the mental status examinations  
5 performed by Dr. Cline and Dr. Bowes in their entirety, and (2) the ALJ's rejection  
6 of Plaintiff's symptom claims was not supported by substantial evidence.  
7 Moreover, as noted by Plaintiff, the ALJ "did not name a single inconsistency" in  
8 support of this finding. ECF No. 14 at 16, 18. A court "cannot substitute [the  
9 court's] conclusions for the ALJ's, or speculate as to the grounds for the ALJ's  
10 conclusions. Although the ALJ's analysis need not be extensive, the ALJ must  
11 provide some reasoning in order for [the court] to meaningfully determine whether  
12 the ALJ's conclusions were supported by substantial evidence. *Brown-Hunter v.*  
13 *Colvin*, 806 F.3d 487, 495 (9th Cir. 2015). Based on the foregoing, the Court finds  
14 the ALJ's conclusory finding that Dr. Bowers and Dr. Cline's opinions were  
15 inconsistent with Plaintiff's "treatment records" is not supported by substantial  
16 evidence.

17       The Court therefore finds the ALJ failed to adequately evaluate Dr. Cline  
18 and Dr. Bowers' opinions in terms of consistency and supportability, as required  
19 by the new regulations. Particularly in light of the need to reconsider Plaintiff's  
20  
21

1 symptom claims, as discussed in detail above, Dr. Bowers and Dr. Cline’s opinions  
2 must be properly reevaluated on remand.<sup>5</sup>

### 3 **C. Lay Witness Testimony**

4 Finally, Plaintiff challenges the ALJ’s consideration of the lay witness  
5 testimony. ECF No. 14 at 19-20. The ALJ found the third-party statement was  
6 generally persuasive, as it was “consistent with the objective record and  
7 [Plaintiff’s] statements on his limitations.” Tr. 115. Plaintiff argues the ALJ erred  
8 because she found the lay witness statement persuasive, but failed to include  
9 limitations noted by the lay witness in the assessed RFC. *See* Tr. 322. The Court  
10 notes that for disability claims filed on or after March 27, 2017, such as this one,  
11 an ALJ is “not required to articulate” how he or she evaluated evidence from non-  
12 medical sources, including family members and friends. 20 C.F.R. §§  
13 404.1520c(d), 404.1502(e). In light of the new regulations, and the need to remand  
14 for reevaluation of Plaintiff’s symptom claims and the medical opinion evidence,  
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16  
17 <sup>5</sup> Plaintiff additionally argues that the ALJ improperly considered the opinion of  
18 state agency “source” J. Anderson, Ph.D. ECF No. 14 at 14. In light of the need to  
19 reconsider Plaintiff’s symptom claims, and the opinions of the examining providers  
20 Dr. Cline and Dr. Bowers, the Court declines to consider this issue here. On  
21 remand, the ALJ must reconsider all of the medical opinion evidence under the  
new regulations.

1 the Court declines to address this challenge here. The ALJ may articulate how she  
2 evaluates this non-medical evidence on remand, as she deems appropriate.

### 3 CONCLUSION

4 The decision whether to remand for further proceedings or reverse and  
5 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
6 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate  
7 where “no useful purpose would be served by further administrative proceedings,  
8 or where the record has been thoroughly developed,” *Varney v. Sec’y of Health &*  
9 *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by  
10 remand would be “unduly burdensome[.]” *Terry v. Sullivan*, 903 F.2d 1273, 1280  
11 (9th Cir. 1990); *see also Garrison v. Colvin*, 759 F.3d 995, 1021 (noting that a  
12 district court may abuse its discretion not to remand for benefits when all of these  
13 conditions are met). This policy is based on the “need to expedite disability  
14 claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that  
15 must be resolved before a determination can be made, and it is not clear from the  
16 record that the ALJ would be required to find a claimant disabled if all the  
17 evidence were properly evaluated, remand is appropriate. *See Benecke v.*  
18 *Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172,  
19 1179-80 (9th Cir. 2000).

20 The Court finds that further administrative proceedings are appropriate. *See*  
21 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103-04 (9th Cir. 2014)  
(remand for benefits is not appropriate when further administrative proceedings

1 would serve a useful purpose). Here, the ALJ improperly considered Plaintiff's  
2 symptom claims and the medical opinion evidence, which calls into question  
3 whether the assessed RFC, and resulting hypothetical propounded to the vocational  
4 expert, are supported by substantial evidence. "Where," as here, "there is conflicting  
5 evidence, and not all essential factual issues have been resolved, a remand for an  
6 award of benefits is inappropriate." *Treichler*, 775 F.3d at 1101. Instead, the Court  
7 remands this case for further proceedings. On remand, the ALJ must reconsider  
8 Plaintiff's symptom claims. The ALJ must also reconsider the medical opinion  
9 evidence under the new regulations, and provide legally sufficient reasons for  
10 evaluating the opinions, supported by substantial evidence. If necessary, the ALJ  
11 should order additional consultative examinations and, if appropriate, take additional  
12 testimony from a medical expert. Finally, the ALJ should reconsider the remaining  
13 steps the sequential analysis, reassess Plaintiff's RFC and, if necessary, take  
14 additional testimony from a vocational expert which includes all of the limitations  
15 credited by the ALJ.


16 **ACCORDINGLY, IT IS ORDERED:**

- 17 1. Plaintiff's Motion for Summary Judgment, ECF No. 14, is **GRANTED**,  
18 and the matter is **REMANDED** to the Commissioner for additional  
19 proceedings consistent with this Order.
- 20 2. Defendant's Motion for Summary Judgment, ECF No. 16, is **DENIED**.
- 21 3. Application for attorney fees may be filed by separate motion.



1 The District Court Clerk is directed to enter this Order and provide copies to  
2 counsel. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

3 **DATED** October 28, 2021.

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6 LONLY R. SUKO  
7 Senior United States District Judge  
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